BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN J. MCMURTRY	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,025,690
	)	& 1,042,145
OK TRANSFER & STORAGE, INC.	)	
Respondent	)	
AND	)	
	)	
VANLINER INSURANCE COMPANY and KANSAS TRUCKERS RISK MANAGEMENT GROUP	)	
Insurance Carriers	)	

ORDER

Respondent and Kansas Truckers Risk Management Group appealed the April 1, 2011, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on July 20, 2011. E. L. Lee Kinch of Wichita, Kansas, was appointed by the Director to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for claimant. Stephen P. Doherty of Overland Park, Kansas, appeared for respondent and Vanliner Insurance Company (Vanliner). Kevin J. Kruse of Overland Park, Kansas, appeared for respondent and Kansas Truckers Risk Management Group (Kansas Truckers).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The Board also considered the March 2, 2007, Settlement Hearing Transcript with attachments and the Stipulation Regarding TTD Paid filed with the Division on February 3, 2011.

ISSUES

Docket No. 1,025,690 regards a January 24, 2005, accident that was settled in March 2007 and is a review and modification proceeding. Docket No. 1,042,145 regards a November 19, 2007, accident. In the April 1, 2011, Award, ALJ Clark determined in Docket No. 1,025,690 that claimant did not sustain his burden of proving that he had any increased impairment to his upper back, neck, shoulders and arms and, therefore, claimant's request for an increase in benefits was denied. Further, in Docket No. 1,042,145 the ALJ awarded claimant a 67% work disability.[1]

Kansas Truckers states in its brief to the Board:

> [T]he respondent respectfully argues that the claimant has failed to introduce any evidence of his average weekly wage and therefore, he has not proven a necessary element of his workers compensation claim. In addition, based on the credible and competent evidence in the record, the claimant has only suffered a 15% permanent partial impairment to the right knee and no additional impairment to his low back. Lastly, if the claimant is granted a work disability, it must be reduced by the claimant's preexisting functional impairments.[2]

In its brief to the Board, Kansas Truckers lists as an issue that claimant's wage loss is suspect because there is evidence that he has been working. The ALJ found claimant has a 100% wage loss. The Board will consider whether claimant has been working as part of the overall issue of whether claimant is entitled to work disability and, if so, the amount of wage loss that claimant suffered.

In his brief, claimant maintained he has sustained a 100% wage loss, a 100% "job loss" and is entitled to a "total award" for the January 2005 accident.[3] Claimant asserts that as a result of his November 2007 accident he sustained a 5% permanent partial impairment to the low back and a minimum of a 69% work disability.

Vanliner contends Docket No. 1,025,690 has not been appealed by an interested party. If the Board decides there is jurisdiction to review the Award entered in Docket No. 1,025,690, claimant should not be entitled to any additional compensation as a result of his review and modification request. Vanliner submits claimant has failed to show any change in his condition as a result of his January 2005 injury. It also maintains that

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[1] A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[2] Kansas Truckers Brief at 19 (filed May 9, 2011).

[3] During oral argument to the Board, counsel for claimant clarified that claimant is seeking compensation for a 100% permanent partial disability based upon the work disability formula in K.S.A. 44-510e and not a permanent total disability under K.S.A. 44-510c.

claimant has failed to present any evidence to support a work disability claim regarding the January 2005 injury. Vanliner argues Kansas Truckers, which insured respondent at the time of the November 2007 injury, is responsible for any work disability in both claims. Vanliner also submits a credit should be given for prior impairments.

In its reply brief to the Board, Kansas Truckers contends the Board has jurisdiction to review the Award in Docket No. 1,025,690.

The issues before the Board on this appeal are:

Docket No. 1,042,145 (Kansas Truckers)

1. Did claimant fail to meet his burden of proof on the issue of average weekly wage?

2. What is the nature and extent of claimant's right knee impairment?

3. Did claimant suffer a back injury by accident arising out of and in the course of his employment?

4. If so, what is the nature and extent of claimant's back impairment?

5. If claimant suffered a work-related back injury, is claimant entitled to a work disability?

6. If so, what is the nature and extent of claimant's disability and should claimant's work disability award be reduced based on claimant's preexisting functional impairment in accordance with K.S.A. 2007 Supp. 44-501(c)?

Docket No. 1,025,690 (Vanliner)

1. Does the Board have jurisdiction to review the ALJ's Award?

2. If so, did claimant suffer a work disability as a result of his job loss and what is the nature and extent of claimant's disability? Or, as asserted by Vanliner, was claimant's work disability a result of the November 19, 2007, accident?

3. If claimant is awarded work disability, should the Award be reduced by claimant's preexisting functional impairment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant suffered work-related neck and bilateral upper extremity injuries on January 24, 2005, and Vanliner was the insurance carrier. The case was settled in a running award on March 2, 2007, by claimant and the respondent and Vanliner. The settlement was based upon the opinion of Dr. Robert L. Eyster that claimant had a 14.4% permanent impairment to the body as a whole and the opinion of Dr. Pedro A. Murati that claimant had a 42% permanent impairment to the body as a whole. The settlement of $37,500 was paid in a lump sum. Claimant had been paid temporary total disability benefits as well. Claimant's average weekly wage was sufficient for the maximum benefit rate, which was $449 on the date of the accident. On February 3, 2011, claimant and the respondent and Vanliner filed with the Division a Stipulation Regarding TTD Paid to stipulate that the correct amount of temporary total disability benefits paid was $26,385.43.

After claimant settled his claim, he continued to work for respondent at the same job he did before being injured. Claimant was a truck driver, conducted inventory, operated a fork lift and sometimes loaded trucks manually. Claimant testified he would load furniture, which required moving his legs, back and arms; bending; stooping; squatting; kneeling and lifting. Claimant indicated he would help load and unload "the smaller stuff" and supervise the loading and unloading of trucks.

Claimant began working for respondent in May 1980 and had an eighth grade education. After sustaining a work-related accident on November 19, 2007, claimant continued to work for respondent performing light duty until February 18, 2008, when he began receiving temporary total disability payments. Claimant received temporary total disability benefits until September 16, 2008 (30 weeks). Claimant filed for review and modification in Docket No. 1,025,690 on October 15, 2008. The record does not indicate why claimant chose October 15, 2008, to file an application for review and modification, but claimant was released as having reached maximum medical improvement on September 16, 2008, and has not worked for respondent or anywhere since February 18, 2008. Respondent is no longer in business and claimant received a termination notice on May 31, 2009. Claimant has been receiving Social Security retirement benefits since July 2007.

Prior to his January 24, 2005, accident, claimant suffered several serious injuries. In the 1970s he injured his right knee, which required surgery. In 1985, claimant injured his low back while working for respondent. In 1988, claimant slipped on ice and Dr. Robert L. Eyster, an orthopedic specialist, performed a surgery on claimant's right knee. In 1991, claimant injured his low back and right knee in a motor vehicle accident and received permanent restrictions. Also, in 2000 claimant fell and injured his wrist.

As a result of the 1991 accident, claimant was diagnosed with a chronic lumbosacral sprain and aggravation of prior knee injuries. Claimant was given a 20% permanent partial disability for the back injury and was restricted to not lifting more than 25 pounds.

In 1993, Dr. Eyster gave claimant a 7% permanent impairment to claimant's lower back. At that time he restricted claimant as follows: avoiding repetitive lifting more than 25 pounds, being careful with working in any bent over position and avoiding repetitive bending and twisting.

On November 19, 2007, while working in San Antonio, Texas, claimant slipped off the left front wheel of a truck and fell onto a cement slab. Claimant alleges he injured his lower back and right leg in the fall. The next day claimant returned to Kansas. On November 23, 2007, claimant saw Dr. Michael T. Catausan of the Wichita Clinic. Claimant reported the right knee injury to Dr. Catausan, but did not report a back injury.[4] Claimant's explanation was that it was the knee that was hurting. Dr. Catausan examined the right knee only and diagnosed claimant with a knee sprain. He gave claimant light duty restrictions, advised using a knee brace with activity and recommended an anti-inflammatory medication.

Claimant's knee did not improve and respondent authorized[5] him to seek treatment from his family physician, Dr. James P. Keller. Claimant saw Dr. Keller on December 7, 2007. There are no notations in Dr. Keller's report indicating claimant reported a back injury. Dr. Keller examined and diagnosed only claimant's right knee. An MRI of claimant's right knee was ordered, which revealed a tear in the posterior horn of the medial meniscus and tricompartmental osteoarthritic changes. After a second visit with Dr. Keller, claimant was referred to Dr. Eyster.

Dr. Keller's report dated October 8, 2009, stated: "We spent time reviewing his work schedule and his home glucose readings and were going to try having him take his Glucovance 5-502 at 4 AM when he gets home from work . . . ."[6] Kansas Truckers asserts this proves claimant was working and did not suffer a 100% wage loss.

Claimant was examined by Dr. Eyster on January 3, 2008, and complained of right knee pain. He did not give Dr. Eyster a history of injuring his right hip or low back in the November 19, 2007, accident. Dr. Eyster advised claimant an arthroscopy would be of little benefit and injections might give claimant some improvement. However, claimant would ultimately need a right knee replacement to get relief. Claimant underwent an

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[4] R.H. & R.M.H. Trans. at 28.

[5] Kansas Truckers Brief at 3 (filed May 9, 2011).

[6] Keller Record (Oct. 8, 2009).

injection, which provided relief only for a few days, and he was prescribed Tylenol and Naproxen.

Claimant ultimately decided to undergo a right total knee replacement. The surgery was performed by Dr. Eyster on April 24, 2008. After the surgery, Dr. Eyster prescribed medications and physical therapy. Dr. Eyster saw claimant several more times, and on September 16, 2008, the doctor indicated claimant reached maximum medical improvement. Dr. Eyster opined claimant has a 37% permanent impairment to the right lower extremity, with 15% resulting from the November 2007 accident.[7] He testified the remaining 22% was attributable to a preexisting degenerative condition. Dr. Eyster's opinion was rendered in accordance with the AMA *Guides*.[8] He opined claimant had a good surgical result. Claimant had approximately 11 office visits with Dr. Eyster for the November 19, 2007, claim. The doctor testified that claimant never complained of a right hip or back injury at those visits. Claimant alleges he reported back pain to Dr. Eyster.

At the request of Kansas Truckers' attorney, Dr. Eyster again examined claimant on March 4, 2010. The doctor's March 2010 report notes that claimant stated he had back pain. Dr. Eyster opined that the accident of November 19, 2007, did not precipitate an increase of lower back or hip complaints.[9] Dr. Eyster's final diagnosis was that claimant had an aggravation to his right knee, but that he did not suffer increased impairment to his hip or to his lower back. As indicated above, in 1993 Dr. Eyster gave claimant a 7% permanent impairment to claimant's lower back and he restricted claimant. Dr. Eyster indicated he did not use the fourth edition of the AMA *Guides* in 1993, but the rating would have been comparable.

At the request of claimant's attorney, on November 11, 2008, claimant saw Dr. Pedro A. Murati, a certified independent medical examiner and diplomate of the American Board of Electrodiagnostic Medicine and the American Board of Physical Medicine and Rehabilitation. Dr. Murati reviewed claimant's medical records, obtained a medical history and performed a physical examination of claimant. Dr. Murati opined that as a result of claimant's accident of November 19, 2007, claimant had a total knee replacement on the right, left sacroiliac joint dysfunction, right trochanteric bursitis and low back pain secondary to sprain and aggravation by a severe antalgic gait.

Based upon the AMA *Guides,* Dr. Murati opined claimant has a 75% impairment to the right lower extremity for the status post right total knee replacement and a 7% impairment for the right trochanteric bursitis for a 77% permanent impairment to the right

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[7] Eyster Depo. at 17-18.

[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (*4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[9] Eyster Depo. at 20.

lower extremity (or a 31% whole person impairment). Dr. Murati indicated the 75% impairment of the right knee was based upon claimant having a poor surgical result from the right total knee replacement.[10] Dr. Murati placed claimant in Lumbosacral DRE Category II for a 5% whole person impairment for the low back pain. By combining the ratings, Dr. Murati opined claimant has a 34% permanent functional impairment to the body as a whole. Dr. Murati testified the 5% permanent impairment to the low back was in addition to the 7% permanent impairment given by Dr. Eyster in 1993 and any low back rating claimant had as far back as 2002.

Dr. Murati placed the following restrictions on claimant in an eight-hour workday: (1) rarely standing, walking, bending/crouching/stooping or using stairs; (2) no climbing ladders, squatting, crawling, kneeling or driving a manual transmission vehicle; (3) no use of repetitive foot controls with the right lower extremity; (4) no lifting/carrying, pushing/pulling greater than 20 pounds, and 20 pounds only occasionally and 10 pounds frequently; and (5) frequent sitting. Dr. Murati indicated claimant needs a sit-down job with rest every two hours for 30 minutes. Based upon the tasks identified by Jerry D. Hardin, a human resources consultant, if claimant is allowed to take breaks as Dr. Murati has recommended, Dr. Murati opined claimant suffered a 38% task loss. However, he opined claimant is essentially and realistically unemployable.[11]

Dr. Murati admitted he did not review actual MRI films or x-ray films, and other than the December 2007 MRI report, he did not review any medical records of medical providers before claimant went to see Dr. Eyster for the November 19, 2007, claim. Nor did he review any medical records regarding that accident date wherein claimant made lower back complaints. Dr. Murati was unaware claimant received chiropractic treatment for his back. Nor did he review any medical records regarding claimant's preexisting low back complaints or accidents. Dr. Murati indicated claimant denied any previous right leg or low back injuries other than previous right knee surgeries (one in the 1970s and another in the 1980s) for work-related injuries.[12] No treatment was recommended by Dr. Murati for claimant's lower back.

At the request of Vanliner, claimant saw Dr. Michael J. Poppa, an occupational medicine specialist, on June 25, 2010. Dr. Poppa reviewed claimant's medical records, obtained a medical history and performed a physical examination of claimant. Claimant reported to Dr. Poppa that the back injury occurred during a work-related fall on November

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[10] Murati Depo. at 12-14.

[11] *Id.*, at 11.

[12] *Id.*, at 9.

19, 2007. Dr. Poppa testified claimant reported a complete resolution of all back complaints and symptoms resulting from claimant's 1991 accident.[13]

When Dr. Poppa initially prepared his June 25, 2010, report, he had not reviewed the medical records associated with claimant's 2005 accident.[14] Nor did Dr. Poppa review the medical records of Dr. Pappademos, who was appointed as a treating physician by the ALJ. He also acknowledged the treatment records from claimant's 2007 accident made no mention of a low back injury.

Dr. Poppa diagnosed claimant with mechanical low back pain that was the direct and proximate cause of the 2007 traumatic accident and an antalgic gait. Dr. Poppa admitted the history given by claimant was the sole basis of this opinion. He testified that based upon the AMA *Guides,* claimant has a 5% permanent impairment to his low back. Dr. Poppa indicated the 5% impairment was in addition to any preexisting impairment to claimant's back.[15]

Dr. Poppa opined claimant has a 37% permanent impairment to the right lower extremity, because claimant had a good result from his right total knee replacement. He indicated that 14% (6% whole person) is a result of the November 19, 2007, accident and the other 23% was preexisting. Dr. Poppa opined the permanent impairments to the low back and right knee combine for an 11% whole body impairment.[16]

In his report of June 25, 2010, Dr. Poppa was not asked to recommend any medical treatment for claimant's low back or right knee, nor did he assign restrictions to claimant. He testified claimant could no longer perform 6 of 16 non-duplicative job tasks identified by rehabilitation consultant Karen Crist Terrill for a 38% task loss. Dr. Poppa determined claimant could no longer perform 4 of 13 non-duplicative job tasks identified by Mr. Hardin for a 31% task loss. At his deposition, Dr. Poppa was not asked if he assigned any restrictions to claimant, but he did give testimony indicating why claimant could not perform certain tasks and whether he agreed with certain restrictions.

Dr. E. Jerome Hanson, a neurological specialist, saw claimant at the request of Kansas Truckers' attorney on June 29, 2010. He reviewed medical records, obtained a medical history from claimant and performed a physical examination of claimant. The medical records reviewed were from claimant's 1991, 2005 and 2007 accidents. The medical history of claimant revealed multiple lumbar strains following many years of heavy

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[13] Poppa Depo. at 31.

[14] *Id.*, at 23, 26.

[15] *Id.*, at 8-9, 42-43 and 46-48.

[16] *Id.*, at 6.

labor. Dr. Hanson indicated that prior to November 19, 2007, claimant periodically received chiropractic treatment to the lumbar spine and he took Lortab for pain complaints. The doctor noted claimant's primary complaint at the time of their visit was pain in his right knee.

Dr. Hanson opined claimant suffered no additional permanent impairment or additional restrictions to his lumbar spine as a result of the 2007 accident. He determined the accident did not accelerate, aggravate or worsen any of the antecedent symptoms involving claimant's lumbar spine condition.[17] Dr. Hanson did not find any evidence suggesting a relationship between claimant's right knee and his lower back symptoms. And he had no evidence to confirm claimant's low back condition structurally changed subsequent to November 19, 2007.[18] With regard to claimant's low back, Dr. Hanson believed claimant had "chronic lumbar strain, secondary to longstanding degenerative disease, ligamentous instability, lumbar osteoarthritis, fairly typical degenerative changes of aging."[19] Dr. Hanson indicated he would adopt Dr. Eyster's restrictions from 1992 for claimant's low back, which Dr. Hanson noted were: no lifting over 50 pounds, no repetitive lifting over 30 pounds and no prolonged sitting, bending or twisting.[20] Dr. Hanson did not believe any additional intervention, other than measures claimant previously had used such as restriction of activity, simple oral analgesics and home exercises, would be beneficial or indicated.

Dr. Hanson testified he observed claimant's knee during the course of the June 29, 2010, evaluation. With regard to claimant's knee, Dr. Hanson felt claimant should avoid repetitive or prolonged squatting, kneeling and stair climbing. The doctor did not have an opinion as to an impairment rating for claimant's knee.

Vocational assessments were made by Karen Crist Terrill and Jerry D. Hardin. Ms. Terrill personally interviewed claimant on July 13, 2010, while Mr. Hardin did so on November 24, 2008. Ms. Terrill and Mr. Hardin were provided a work history and educational background by claimant. Ms. Terrill reviewed the restrictions of Dr. Eyster. Mr. Hardin reviewed the medical reports of Drs. Eyster and Murati. Ms. Terrill determined claimant performed 16 non-duplicative job tasks in the 15 years prior to the 2007 accident. Mr. Hardin identified 13 non-duplicative job tasks. Mr. Hardin's report indicated claimant earned $1,000 per week while employed for respondent.[21] At the June 10, 2010, regular

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[17] Hanson Depo., Ex. 2 at 13.

[18] *Id.*, at 18.

[19] *Id.*, at 19.

[20] *Id.*, at 24.

[21] Hardin Depo., Ex. 1.

hearing and review and modification hearing, pages of Mr. Hardin's report indicating claimant earned $1,000 per week were introduced as an exhibit by claimant without an objection from respondent and its insurance carriers.[22]

The ALJ simultaneously held the review and modification hearing in Docket No. 1,025,690 and the regular hearing in Docket No. 1,042,145. None of the parties objected. The counsel of all the parties were present at all depositions. The ALJ did not issue an order consolidating the cases. Claimant's attorney prepared and sent all parties a Notice of Prehearing Settlement Conference, a Notice of Regular Hearing, and two amended notices of regular hearing. The ALJ's Award lists both docket numbers and insurance carriers in the heading and delineates a common record. The ALJ addressed the claims separately in the Award.

PRINCIPLES OF LAW

Docket No. 1,042,145 (Kansas Truckers)

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[23] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[24] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[25] The existence, nature and extent of the disability of an injured workman is a question of fact.[26] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[27] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[28]

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[22] R.H. & R.M.H. Trans. at 17.

[23] K.S.A. 2007 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[24] K.S.A. 2007 Supp. 44-501(a).

[25] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[26] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[27] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[28] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[29] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[30]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[31] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[32]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[33]

Docket No. 1,025,690 (Vanliner)

K.S.A. 2010 Supp. 44-551(i)(1) in pertinent part states:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in

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[29] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[30] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[31] K.S.A. 2007 Supp. 44-501(a).

[32] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[33] *Id.*

> the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

In *Solis*,[34] the claimant sought the cost of repairing a prosthesis which was provided by the employer as a result of a work-related injury. At the time of the accident Hartford was the insurance carrier. Hartford alleged the prosthesis was damaged as a result of subsequent work-related mini-traumas and that Brookover's new insurance carrier, Kansas Livestock Association (KLA), should be liable. The claimant filed a second claim against Brookover and KLA. The Assistant Director determined Hartford was liable. Hartford appealed, but the claimant and KLA did not. Hartford argued KLA was not a party to the appeal. The Board concluded KLA was a party to the appeal despite the fact it had never filed for review. The Kansas Supreme Court agreed. The Court stated:

> This argument is without merit. It is undisputed that Docket No. 190,678 and No. 220,773 were consolidated. Although only Hartford petitioned the Board for review, K.S.A. 44-551(b)(1) does not limit the Board's scope of review to issues raised in the written request for review. Rather, once a party files a written request for review of the administrative law judge's decision, the Board has the authority to address every issue decided by the administrative law judge. *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 516, 949 P.2d 1149 (1997). See *Helms v. Tollie Freightways, Inc.*, 20 Kan. App. 2d 548, 553, 889 P.2d 1151 (1995). Because the two cases were never severed, the Board had jurisdiction to address any of the issues raised in the consolidated cases, and KLA was a proper party.
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> Further, it is clear that in addition to being consolidated, Docket No. 190,678 and No. 220,773 were inextricably intertwined. The damage to the glove and the duty to make repairs were either the responsibility of Hartford or KLA. The Assistant Director's finding in Docket No. 190,678, that Hartford was liable for repairs, necessarily led to the finding in Docket No. 220,773 that KLA was not liable. Were the Board to find that the Assistant Director had erred in holding Hartford liable, the Board would also necessarily have found that the Assistant Director had erred in absolving KLA of liability. Thus, Hartford's argument that KLA was not a proper party and had no stake in the proceedings is without merit.[35]

In *Magana*,[36] two claims were formally consolidated for trial and award, but the record did not disclose that the ALJ ruled on the claimant's motion to consolidate a third

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[34] *Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan.750, 999 P.2d 921 (2000).

[35] *Id.*, at 753-754.

[36] *Magana v. IBP, Inc.*, 109 P.3d 203, 2005 WL 824073 (No. 92,323, Kansas Court of Appeals unpublished opinion filed Apr. 8, 2005).

claim with the others. The ALJ made separate findings and entered separate awards for each claim. The Board found all three claims were combined and consolidated by the ALJ despite the absence of a formal order addressing the three claims. The Kansas Court of Appeals found this was a correct finding by the Board and that the Board had jurisdiction to consider the issues raised in all three claims.

K.S.A. 44-510e(a) states in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A 44-528(b) states:

> If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may modify the award and reduce compensation or may cancel the award and end the compensation.

In *Serratos*,[37] the claimant sought a review and modification when he was discharged from his employment with cause. Claimant had no increased permanent functional impairment, but argued that he suffered a work loss and was entitled to work disability under K.S.A. 44-528 and K.S.A. 44-510e(a). The Kansas Court of Appeals summarized by stating:

> In summary, K.S.A. 44-528 provides a means for either the employer or employee to seek a modification of an award. Where the employee seeks a modification of work disability because of a subsequent wage loss, the work

[37] *Serratos v. Cessna Aircraft Company*, 253 P.3d 798, 2011 WL 2637449 (No. 104,106, Kansas Court of Appeals unpublished opinion filed July 1, 2011). Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. But they may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion and provide assistance to the court in its disposition.

> disability is calculated under K.S.A. 44-510e(a). In this case, Serratos' work disability increased because of a total wage loss. Under K.S.A. 44-528(a), the ALJ, and the Board on appeal, had the authority to modify the award "upon such terms as may be just" and "subject to the limitations" in the Act – K.S.A. 44-510e(a). Subsection (b) need not be considered under the circumstances.[38]

In *Sayre*,[39] this Board reiterated, ". . . the test is claimant's actual wage earnings, pre-award and post award, and not his capability to earn the same or higher wages."

K.S.A. 2004 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

ANALYSIS

Docket No. 1,042,145 (Kansas Truckers)

Kansas Truckers asserts that claimant failed to introduce evidence of average weekly wage. A careful perusal of the record reveals otherwise. Exhibit 1 of Mr. Hardin's deposition contains Task Performance Capacity Assessment documents, which state that claimant's weekly wage while working for respondent was $1,000 per week. The same documents are Claimant's Exhibit 1 of the June 10, 2010, regular hearing and review and modification hearing. Respondent and its insurance carriers did not object to the introduction of the Task Performance Capacity Assessment documents. Therefore, claimant has met his burden of proof establishing an average weekly wage of $1,000 per week. Furthermore, it is respondent's obligation to admit any facts it cannot justifiably deny and to have payroll records available at the regular hearing.[40]

Three physicians provided an opinion regarding claimant's right knee impairment. Drs. Eyster and Poppa found claimant has a 37% permanent impairment to the right knee. Dr. Eyster determined a 15% permanent impairment resulted from the 2007 accident while Dr. Poppa opined 14%. Dr. Murati opined claimant has a 75% permanent impairment to the right knee, but did not specify whether any of the impairment was the result of a preexisting condition.

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[38] *Id.*

[39] *Sayre v. Steven Motor Group*, No. 1,044,568, 2011 WL 2185259 (Kan. WCAB May 6, 2011).

[40] K.A.R. 51-3-8(c).

The ALJ found Dr. Poppa's opinion persuasive and, thus, determined that claimant has a 14% permanent impairment to the right knee as a result of the 2007 accident. Dr. Poppa examined claimant on only one occasion. Following the 2007 injury, Dr. Eyster performed claimant's right knee replacement and saw claimant approximately 12 times. Dr. Eyster performed surgery on claimant's right knee after an accident in the 1980s and saw claimant following a 1991 accident. Because he has provided treatment for claimant's right knee since the 1980s, Dr. Eyster is in the best position to determine claimant's permanent impairment. Accordingly, the Board finds claimant has a 15% permanent impairment of the right knee.

Claimant also asserts that as a result of the 2007 accident he suffered a low back injury. Dr. Eyster testified that during treatment for the 2007 right knee injury, claimant never complained of low back pain. Claimant asserts he reported low back pain to Dr. Eyster. The records of Dr. Catausan and Dr. Keller make no mention of low back complaints. The first time a complaint of back pain is noted in any medical record was in Dr. Murati's report of November 11, 2008.

Drs. Murati and Poppa opined claimant suffered a back injury as a result of the 2007 accident. Drs. Eyster and Hanson determined the opposite. Dr. Murati did not review the actual MRI films and did not review all of claimant's medical records regarding the November 19, 2007, claim. Nor did he review medical records regarding claimant's preexisting back complaints or the 1991 accident wherein claimant injured his back. Claimant denied having preexisting back problems to Dr. Murati. He told Dr. Poppa that all prior back symptoms had resolved. Dr. Poppa admitted there were no medical records to support a back injury and he relied on claimant's statements. Dr. Poppa did not review the medical records of Dr. Pappademos.

Dr. Hanson reviewed claimant's medical records from the 1991, 2005 and 2007 accidents. Unlike Dr. Murati, Drs. Hanson and Eyster were aware that prior to the 2007 accident claimant had a history of low back problems. Dr. Eyster has treated claimant for back, right knee and neck injuries since the 1980s. Dr. Eyster has extensive knowledge of claimant's physical condition and job tasks performed. Simply put, Drs. Eyster and Hanson had more accurate information upon which to base their opinions. The Board concludes that claimant has failed to prove by a preponderance of the evidence that he suffered a back injury arising out of and in the course of employment. This renders moot all other issues raised in Docket No. 1,042,145.

Docket No. 1,025,690 (Vanliner)

Neither Vanliner nor claimant filed an appeal in Docket No. 1,025,690. Vanliner asserts the Board is without jurisdiction to review that claim because none of the interested parties filed an appeal. However, counsel for respondent and Kansas Truckers filed an appeal on behalf of both respondent OK Transfer & Storage, Inc., and Kansas Truckers. OK Transfer & Storage, Inc., is claimant's employer in both claims and is, therefore, an

interested party in both claims. Vanliner also argues the ALJ did not issue an Order consolidating the two claims. While the ALJ did not issue an Order consolidating the claims, they were nevertheless combined.

Vanliner was present at the June 10, 2010, regular hearing and review and modification hearing, as well as all the depositions. Vanliner never objected to the claims being consolidated for hearing or requested the ALJ to separate the claims. In essence, Vanliner acquiesced to consolidating the claims. Vanliner asserts claimant's 2007 accident caused claimant's work disability, which is an issue integral to both cases. Additionally, the real party in interest in both cases is the same respondent.

The parties and issues in these two claims are entangled and involutional. *Solis* held the appeal of one party confers jurisdiction upon the Board to hear all issues decided by the ALJ. In *Magana*, no formal order consolidating all the claims was issued, but the Board had jurisdiction to review all issues decided by the ALJ. Consequently, the Board has jurisdiction to review this matter.

Claimant lost his job due to the respondent going out of business. Claimant did not have an increase in functional disability or restrictions as a result of his 2005 injuries. Consequently, claimant does not allege a task loss. Claimant's job loss results in a wage loss and a work disability under K.S.A. 44-510e.

Kansas Truckers asserted claimant was working and, thus, did not suffer a 100% wage loss. It cites an October 8, 2009, medical report of Dr. Keller as evidence claimant was working. Claimant testified he has not worked since February 18, 2008, and is currently receiving Social Security retirement benefits. Kansas Truckers nor Vanliner provided any evidence claimant has been working, except for Dr. Keller's report. Claimant's tax returns or W-2 forms were not made part of the record. The Board finds the greater weight of the evidence demonstrates claimant has not worked since February 18, 2008, and, thus, has a 100% wage loss.

K.S.A. 44-528 permits the modification of an award in order to conform to changed conditions.[41] If there is a change in the claimant's work disability, then the award is subject to review and modification.[42] In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[43] Our appellate courts have consistently held that there must be a change of circumstances, either in a claimant's

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[41] *Nance v. Harvey County*, 236 Kan. 542, Syl. ¶1, 952 P.2d 411 (1997).

[42] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

[43] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

physical or employment status, to justify modification of an award.[44] The change does not have to be a change in the claimant's physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage,[45] or losing a job because of a layoff.[46] The burden of establishing the changed conditions is on the party asserting them.[47]

The Kansas Supreme Court, in *Bergstrom*,[48] requires that the fact finder follow and apply the plain language of K.S.A. 44-510e which requires that a post-injury wage loss must be based upon the actual average weekly wage claimant earned while working as compared to the average weekly wage claimant is earning after the injury. Claimant lost his job and has a 100% wage loss. In looking at the resulting wage loss, *Bergstrom* does not ask why. It merely calculates the loss and applies the resulting number.

The Board finds that K.S.A. 44-510e controls in this matter over the general language in K.S.A. 44-528 and reflects the legislature's most recent expression of its intent on how permanent partial general (work) disability awards are to be computed. Thus, the test is claimant's actual wage earnings, post award, and not his capability to earn the same or higher wages. Stated another way, where claimant seeks modification because of a subsequent wage loss, the work disability is calculated under K.S.A. 44-510e(a). The Board's foregoing analysis and conclusion was affirmed in *Serratos* by the Kansas Court of Appeals in a recent, not-designated-for-publication decision. The Board reaffirmed its position in *Sayre*. Claimant has met his burden of proof to establish his permanent partial general disability increased. Therefore, the Board concludes claimant has no task loss but has suffered a 100% wage loss for a 50% work disability.

Vanliner contends it should be given a credit and asserts that in *Payne*,[49] the Kansas Court of Appeals determined that in work disability cases, the employer is entitled to a credit for any prior impairment ratings. The credits sought by Vanliner are a 7% preexisting impairment to claimant's lower back and a 22% preexisting impairment to the right knee. However, the facts in *Payne* are different from the current claim. Payne had a prior back injury which resulted in a 35% impairment. Payne aggravated the back injury

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[44] *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

[45] *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997).

[46] *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 372, 899 P.2d 516 (1995).

[47] *Morris*, 3 Kan. App. 2d at 531.

[48] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[49] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

and was awarded permanent total disability. The respondent requested a credit for the 35% impairment pursuant to K.S.A. 44-501(c).

Claimant's preexisting injuries were to claimant's right knee and lower back. The 2005 accident resulted in an impairment to the neck and bilateral upper extremities. No evidence was presented that the preexisting impairments and resulting restrictions caused a task loss. There was no wage loss immediately after the 2005 accident as claimant returned to work. In *Payne*, it was the aggravation of claimant's preexisting condition that directly led to a finding of permanent total disability. Accordingly, the Board denies Vanliner's request for a credit.

CONCLUSION

Docket No. 1,042,145 (Kansas Truckers)

1. The claimant met his burden of proof that his average weekly wage was $1,000 per week.

2. As a result of the accident on November 19, 2007, claimant suffered a 15% permanent partial impairment of the leg (right knee).

3. Claimant did not suffer a back injury by accident arising out of and in the course of his employment.

4. Claimant is not entitled to a work disability.

5. Because the permanent partial disability award is limited to a scheduled injury under K.S.A. 44-510d, the issue of claimant's work disability award being reduced based on claimant's preexisting functional impairment in accordance with K.S.A. 2007 Supp. 44-501(c) is moot.

Docket No. 1,025,690 (Vanliner)

1. The Board has jurisdiction to review the ALJ's Award.

2. Claimant suffered a 50% work disability as a result of his job loss.

3. The award of work disability shall not be reduced by claimant's preexisting functional impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[50] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies in part and reverses in part the April 1, 2011, Award entered by ALJ Clark as follows:

Docket No. 1,042,145 (Kansas Truckers)

John J. McMurtry is granted compensation from OK Transfer & Storage, Inc., and Kansas Truckers Risk Management Group for a November 19, 2007, accident and resulting disability. Based upon an average weekly wage of $1,000, Mr. McMurtry is entitled to receive 30 weeks of temporary total disability benefits at $510 per week, or $15,300, plus 25.5 weeks of permanent partial disability benefits at $510 per week, or $13,005, for a 15% loss of use of the right leg, making a total award of $28,305, which is all due and owing less any amounts previously paid.

Docket No. 1,025,690 (Vanliner)

Per the settlement on March 2, 2007, and the Stipulation Regarding TTD Paid of claimant and the respondent and Vanliner filed with the Division on February 3, 2011, claimant is entitled to $26,385.43 in temporary total disability benefits, which if divided by the benefit rate of $449 per week results in claimant receiving 58.76 weeks of temporary total disability benefits, followed by $37,500 in a running award, which if divided by the benefit rate of $449 per week results in claimant receiving 83.52 weeks of permanent partial disability benefits. Claimant's total compensation received was $63,885.43.

John J. McMurtry is granted compensation from OK Transfer & Storage, Inc., and Vanliner Insurance Company for a January 24, 2005, accident and resulting disability. Mr. McMurtry is entitled to receive $26,385.43 in temporary total disability benefits (equating to 58.76 weeks of temporary total disability benefits at $449 per week), plus $37,500 in permanent partial disability benefits (equating to 83.52 weeks of permanent partial disability benefits at $449 per week), plus, effective September 16, 2008,[51] 80.43 weeks of permanent partial disability benefits at $449 per week, or $36,114.57, for a 50% work

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[50] K.S.A. 2010 Supp. 44-555c(k).

[51] This is the effective date of the modification, which is the date claimant reached maximum medical improvement (MMI). Claimant never returned to work after reaching MMI.

disability, making a total award of $100,000, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September, 2011.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and Vanliner
Kevin J. Kruse, Attorney for Respondent and Kansas Truckers
John D. Clark, Administrative Law Judge